

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE BOARD OF SOIL AND WATER RESOURCES

In the Matter of the Proposed Rules
of the Board of Soil and Water
Resources Relating to Wetlands,
Minnesota Rules, Chapter 8420

REPORT OF
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Allan W. Klein on February 25, 1998 in St. Cloud, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 (1996) to hear public comment, to determine whether the Board of Water and Soil Resources (hereinafter Board) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the proposed rules, whether the proposed rules are needed and reasonable, and whether or not modifications to the rules proposed by the Board after initial publication are impermissible, substantial changes.

The Board's hearing panel consisted of John Jaschke, Wetland Conservation Act Program Manager.

Only one person attended the hearing. He stated informally that he favored the rules as proposed, and did not want to testify. The hearing continued until all interested person, groups or associations had an opportunity to be heard concerning the proposed amendments to these rules.

The record remained open for the submission of initial written comments for five working days following the hearing to March 4, 1998. Following a response period, the rulemaking record closed for all purposes on March 11, 1998. During the initial and responsive comment period, the ALJ did not receive any written comments from interested persons or the agency.

NOTICE

This Report must be available for review to all interested persons upon request for at least five working days before the Board takes any further action on the proposed amendments. The Board may then adopt a final rule, or modify or withdraw its proposed amendments. If the Board makes changes in the rule other than those recommended in this report, it must submit the rule with the changes prior to final

adoption. Upon adoption of a final rule, the Board must submit it to the Revisor of Statutes for a review of the form of the rule.

If the Board files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all of the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On December 12, 1997, the Board requested the scheduling of a hearing and filed the following documents with the Office of Administrative Hearings:

- A. a copy of the proposed rules certified by the Revisor of Statutes;
- B. the Dual Notice of Hearing proposed to be issued; and
- C. the final draft of Statement of Need and Reasonableness (SONAR).

2. On December 29, 1997, the Board mailed the Dual Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice. Additional Notice was given to a variety of individuals and organizations, such as all local governmental unit wetland contact people, all county highway engineers, all county planning and zoning administrators, all county board chairs, all SWCD offices, all watershed district offices, and others. Initially, the Board had not planned to do any Additional Notice, and the Board explained in the SONAR why additional notice was not being provided. However, the staff decided that it would be safer to give Additional Notice, and it did so on December 29. The ALJ finds that the Board has met the requirement of Minn. Stat. § 14.131. The fact that the SONAR is incorrect, and the Board actually gave more notice than the SONAR indicates, is a harmless error under Minn. Stat. § 14.26(3)(d)(1).

3. On January 12, 1998, the Dual Notice of Hearing and a copy of the proposed rules were published at 22 State Register 1187.

4. On the day of the hearing, the Board placed the following documents into the record:

-- A copy of the Board's Request for Comments dated October 20, 1997 and a certificate of mailing the Request for Comments to the Board's rulemaking list on October 13, 1997.

-- A copy of 20 State Register 629, October 20, 1997, containing the publication of the Request for Comment.

-- The proposed rule, including the revisor's approval.

-- A memorandum to the Commissioner of Agriculture, dated December 10, 1997, stating that pursuant to Minn. Stat. § 14.111, the Board is forwarding a copy of the SONAR for his review.

-- A Memorandum dated December 24, 1997, to the Legislative Reference Library submitting the SONAR.

-- The Dual Notice as mailed and as published in the State Register at 22 State Register 1187.

-- The certificate of mailing the Dual Notice and certificate of mailing list.

-- Three written comments written in response to the Request for Comments. All supported the rule as proposed.

-- Twenty-eight comments including 27 requests for a public hearing twenty-six of which were identical form letters individually signed.

-- A letter, dated February 18, from John Jaschke, Wetland Conservation Act Program Manager for the Board, that was sent to the twenty-six individuals requesting a hearing requesting withdrawal of the hearing requests.

The SONAR was dated December 24, 1997 and the Notice of Intent to Adopt Rules was dated December 24, 1997. Pursuant to Minn. Stat. § 14.23, before the date of the notice, the agency shall prepare a SONAR, which must be available to the public. Therefore, the SONAR should have been dated or finalized before the date of the Notice of Intent to Adopt Rules, at the latest by December 23, 1997. In addition, the SONAR did not contain a citation to the agency's grant of statutory authority to adopt the rule as required by Minn. R. 1400.2070, subp. 1, item D.

The Administrative Law Judge has determined that these procedural errors did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process and thus constitute harmless errors under Minn. Stat. § 14.26(3)(d)(1).

All of the above-mentioned documents have been available for inspection at the Office of Administrative Hearings from the date of filing.

Overview of Judge's Analysis

5. Minn. Stat. § 14.50 requires the Administrative Law Judge to take notice of the degree to which the Board has demonstrated the need for and reasonableness of its proposed rules with an affirmative presentation of facts. Minn. Stat. § 14.14, subd. 2 requires the Board to make an affirmative presentation of facts establishing the need for and reasonableness of its proposed rules. That statute also allows the Board to rely upon facts presented by others on the record during the rule proceeding to support the proposal. In this case, the Board prepared a Statement of Need and Reasonableness ("SONAR") to support the adoption of each of the proposed amendments.

In addition to need and reasonableness, the Administrative Law Judge must assess whether the Legislature has granted statutory authority to the Board, whether rule adoption procedure was complied with, whether the rule grants undue discretion to Board personnel, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another, or whether the proposed language is impermissibly vague.

6. Most of the amendments proposed by the Board drew no criticism. This Report is generally limited to reviewing those proposed amendments that received significant critical comment or otherwise need to be examined. Accordingly, this Report will not discuss each subpart of each rule. Moreover, because most of the proposed rules were not opposed, and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the Board has demonstrated the need for and reasonableness of provisions of the rule that are not discussed in this Report, that such provisions are within the Board's statutory authority noted above, and that there are no other problems that prevent their adoption.

Statutory Authority and Nature of the Proposed Rule Amendments

7. Generally, Minn. Stat. § 103B.101, subd. 7, grants the Board of Water and Soil Resources the power to: ". . . hold public hearings and adopt rules necessary to execute its duties." More specifically, Minn. Stat. § 103B.3355(b) requires the Board to adopt rules establishing: ". . . (1) scientific methodologies for determining the functions of wetlands; and (2) criteria for determining the resulting public values of wetlands", and Minn. Stat. § 103G.2242, subd. 1, requires the Board adopt rules governing the approval of wetland value replacement plans under this section.

8. The Administrative Law Judge concludes that the Board does have statutory authority to adopt the proposed rule amendments.

Section-by-Section Analysis

9. All but one of the persons who requested a hearing submitted identical letters. They listed three rules which they opposed. Two of them are linked together.

Those two are proposed Rules Parts 8420.0110, subp. 20a and subp. 29a. The first is a definition of the phrase "greater than 80% area", while the second is the definition of the phrase "less than 50% area". These are both part of an attempt to avoid a "one size fits all" approach in favor of classifying portions of the state, and treating the different classifications differently, depending upon how much of their presettlement wetland acreage is still intact. Objectors to the rule, which came primarily from Houston County, were concerned that these two definitions, working together, placed an undue burden on landowners and local officials because the rules assume there are plenty of areas within the county or watershed that are available for restoration, while in reality, in counties like Houston, there are not. They believe that this is but one example of the many impacts which have created seemingly insurmountable barriers for Houston County and similar areas of the state.

10. The Board staff's position on this objection is that the language at issue comes verbatim from statute, and the rule cannot change definitions contained in the statute.

11. The Administrative Law Judge agrees with the Board staff. The entire wetland regulation area is a very complex one, and one where the statute contains quite a bit of detail. It would create serious confusion and conflict for the rule to vary from the statute. These are situations where the statute must be amended, not just the rules.

12. The other rule of concern to the Houston County objectors is proposed Part 8420.0560, which is an entirely new rule dealing with local plans for comprehensive wetland protection and management. Essentially, these plans would allow a local unit of government, or a group of them operating together, to avoid a number of the rules which would otherwise apply to them if, as an alternative, they adopted a local plan. The rule specifies what must be in the plan, and how it must be adopted. The rule is based upon a statute adopted in 1996, chapter 462. The rule is taken verbatim from the statute, with one editorial change which is of no substance.

13. The concern of the Houston County commentators is set forth as follows:

There should be an addition [to the rule] which states counties which can document existing ordinances and regulations which have met the spirit of no net loss of wetlands are exempt from all administrative procedures provided they annually document that no wetlands have been impacted such that the WCA would have prevented such impact had it been applied in the county.

The Administrative Law Judge finds that this would be such a substantial addition to the regulatory scheme that it must be made by the Legislature, and not by the Board. It would be a major addition to the statutory scheme which can only be made by the Legislature.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Board of Water and Soil Resources gave proper notice of the hearing in this matter.
2. That the Board has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule, except as noted at Findings 2 and 4, which both find only harmless errors.
3. That the Board has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii).
4. That the Board has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).
5. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.
6. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the proposed rules be adopted.

Dated this _____ day of March 1998.

ALLAN W. KLEIN
Administrative Law Judge

Reported: Tape Recorded;
No Transcript Prepared